Hague Journal on the Rule of Law
https://doi.org/10.1007/s40803-018-0081-6

ARTICLE

Constitutional Markers of Authoritarianism

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Abstract
After many waves of democratisation a new type of constitutional transformation has become the focus of scholarly attention. Some researchers claim that the current erosion of constitutionalism can be understood better if the phenomenon is compared to the twentieth century dictatorships. Many others argue that what is happening today is a self-destruction of liberal democracy through democratic procedures and under the formal rule of law. This article aims to contribute to the understanding of the new system, and offers another approach. It shows that in a normative sense democracy today is the only legitimate constitutional system. That is why a key attribute of contemporary authoritarianism, a sui generis system between constitutional democracy and dictatorship, is a pretence of democracy. The article suggests that mechanisms of pretence can be identified with the help of constitutional markers, which allow a reliable distinction between constitutional democracy and authoritarianism. Constitutional markers can be revealed on two levels: first, by a systematic account of the constitutional text and practice and second, by exploring the deep structure of the false justification of the system.

1 Introduction

"No tyranny is more cruel than the one practiced in the shadow of the laws and under color of justice—when, so to speak, one proceeds to drown the unfortunate on the very plank by which they had saved themselves."[1] In his *Considerations on the Causes of the Greatness of the Romans and their Decline*, Montesquieu expresses this view. He recalls an old law of the Roman Republic against treason, sedition, bad administration and other acts committed against the people (*law of majesty*). Tiberius seized on this law and applied it, not to the cases for which it had been created, but to "anything that could serve his hatred or suspicion," including accusations of treason

[1] Montesquieu (1999) at 129.

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Published online: 10 September 2018

against the emperor. Not only actions fell within the scope of this law, but words and even thoughts. And since "a tyrant never lacks instruments for his tyranny," Tiberius used the senators as his servants and found judges ready to sentence innocent people.

Although Montesquieu can be criticized on account of his misjudgments or historical inaccuracies, he is considered as one of the architects of modern constitutionalism. The essay on the Romans was written circa one decade earlier that his seminal work, *The Spirit of the Laws*. We find in this earlier essay the first formulation of the idea of separation of powers. Political power should be distributed among the main constitutional branches (legislature, executive, judiciary), and they should keep each other under control. This kind of constitutional system is necessary for securing political liberty and preventing the emergence of "tyrannical laws" and "execution of laws in a tyrannical manner."[2] The theory has its origin in the treaties of Locke and has had a huge impact on constitutional lawyers as well as the framers of many modern constitutions. Montesquieu shows with clarity that the form of government he considers the source of Rome's greatness is the republic, where the Senate and the Consuls mutually balance each other. And he also explains that the transformation of the country into a tyranny of emperors belongs to the history of decline.

Is it reasonable to assume that Montesquieu has captured a general characteristic of autocratic transformation? The emerging autocrat is masked by a *pretence* that he submits to the legal principles and rules. He acts *as if* he provided the country with a legal continuity. Although contemporary constitutional systems may have evolved gradually from their classical and medieval predecessors, in this article I do not seek to draw a parallel between them. My aim is to show that the pretence of democracy is a key attribute of contemporary authoritarianism, a political system between constitutional democracy and dictatorship.

In the first part of this article (Sects. 2–4), I offer a conceptual analysis and methodological points by examining the following questions: What is the contemporary descriptive and normative understanding of democracy as a constitutional system? Why do scholarly works give divergent accounts to the new deviation from constitutional democracy? What are the semantic roots of the terminological difficulty? In the second part (Sects. 5–7), I argue that today authoritarianism plays at being democracy—beyond general semantic reasons, that is the special source of the identification difficulties. I introduce first-order constitutional markers at the most fundamental level and second-order constitutional makers at the deep structure of counterfeit democracies in order to draw a distinction between democratic and authoritarian constitutional systems.

2 Normative Legitimacy: Better and Worse Constitutional Systems

Contrasting moderate governments of the Roman republic with despotic emperors, Montesquieu's approach is far from unique. From the very beginning, constitutional theorists have described and compared different forms of government

[2] Montesquieu (1989) Book XI Chapter 6 at 157.

according to those persons who possess the sovereign power. From Aristotle to Kant, it is assumed that on *descriptive level* there are three possible forms because public power can be held by one, by a few, or by many. Kant calls these autocracy, where one; aristocracy, where some associated together; and democracy, where all those who constitute society, possess sovereign power. He characterizes them, respectively, as the power of a monarch, of the nobility, and of the people.[3]

Beyond the descriptive level, constitutional theorists also distinguish between better and worse, just and unjust forms of government. The evaluation of constitutions is based upon the thinkers' own theories of justice. Usually, two ideal types are distinguished on this *normative level*. Aristotle claims that constitutions which aim at "the common advantage are correct and just," whereas those which aim only at "the advantage of the rulers are deviant and unjust," because they involve despotic rule, which is inappropriate for a community of free persons.[4] For Kant, a government is either republican or despotic. Republicanism is the political principle of the separation of the executive power (the administration) from the legislative; despotism is that of the autonomous execution by the state of laws which it has itself decreed. Thus republicanism means representative and limited government, whereas in despotism the public will is administered by the ruler as his own will.

Montesquieu, in a slightly different fashion, merges descriptive and normative accounts of government. He holds that there are three types: republican government, which can take either democratic or aristocratic forms; monarchy; and despotism. It means that he normatively distinguishes republican and monarchical governments from despotic states. The first and second forms may involve moderate institutional structures and laws to check the ruler(s), while a despot is a single person who "alone governs according to his wills and caprices".[5] As a result, people of a despotic state live in appalling conditions, and the driving force of the system is fear.

Regardless of their variations, today we may understand these kinds of normative accounts as antecedents of the Rawlsian normative level of *legitimacy*, distinguished from Weber's sociological or empirical conception. As Dworkin puts it, the normative legitimacy of a government depends on how the government has acquired its power and how it uses that power. When the establishment and performance of a government can be justified by normative reasons, we call it legitimate government.[6] In this sense, a government in particular and a constitutional system in general can be legitimate. In sum, there is a long scholarly tradition of distinguishing correct and deviant, legitimate and illegitimate forms of government.

Taking a look at the place of the concept of *democracy* in these descriptive and normative accounts, the history of theoretical discussion shows that it was typically regarded as one of the three descriptive forms of government where the people rule, rather than a monarch or an aristocracy. Moreover, before the nineteenth century the normative account of democracy was mostly critical. Aristotle categorises

[3] Kant (1983) at 107, 114.
[4] Aristotle (2009) Book III. Chapter 7. 1279a, 97–100.
[5] Montesquieu (1989) Book III Chapter 2 at 21.
[6] Dworkin (2011) at 321.

democracy as a deviant form of government by the many. Kant's normative considerations also lead the conclusion that democracy is "necessarily a despotism," because when "all", who are not quite all, decide unrestrainedly against one who disagrees, that is a contradiction with freedom.[7]

However, the case for democracy, as a type of government, has changed radically. Today there is a general agreement that democracy is the best or the most legitimate constitutional system. Understood as the self-rule of the people, democracy does not have rivals. Declaring that a constitutional system in general or a government in particular is undemocratic is automatically intended as a condemnation. Hans Kelsen clarified a century ago the correlation between democracy and legitimacy: it is not inherent in the nature of democracy that it is always the best system of government; on the contrary, the question is what is the best form of government, and today the answer is democracy, but that was not the case earlier in history and will not be necessarily always the case. There is a contemporary consensus among scholars that democracy has instrumental advantages over rival governmental forms.[8] Perhaps this is the correlation what Churchill was trying to express in quoting an unknown predecessor: "It has been said that democracy is the worst form of Government except for all those other forms that have been tried from time to time."[9]

In historical context, *autocracy* can be characterised descriptively as the power of one ruler, for example, a monarch. What theorists in former times categorised as an illegitimate system was despotism or tyranny, and not necessarily autocracy. Today, on the contrary, autocracy means nearly the same as the unjust, worst, or illegitimate constitutional system.

Importantly, Kelsen's rival theorist, Carl Schmitt, also admits that democracy is the only available principle as a basis for a contemporary constitution.[10] His aim is to give a democratic reinterpretation of the conception of sovereignty, and he reaches the conclusion that democracy can be associated with a dictatorship in the name of the people.[11] One might say that Schmitt gives an extraordinary answer to the question of democracy, but today there is a consensus that democracy and autocracy or democracy and dictatorship, a word with a similar pedigree, are not only different constitutional systems but also two opposing poles. The ideal type of democracy is the best possible constitutional system, that of autocracy is the worst.

3 The Vocabulary of the New Transitology

More than half of the countries in the world are currently far from what we would consider normatively correct constitutional democracies. Many of them are under autocratic governments or even tyrants. One-third of the population of the globe has

[7] Kant (1983) at 114–115.
[8] Kelsen (2000) at 84–109. See also Murphy (2014) at 65–67.
[9] Churchill (1947).
[10] Schmitt (2005) at 50–52.
[11] Schmitt (1985) at 30–32.

never experienced constitutional democracy within open and free societies. What is more alarming is that, in contrast to previous waves of democratization that have spread across the globe, populist autocratic tendencies have led to the disintegration of democracies.[12] The cases from Russia and Turkey to Hungary and Poland (two EU Member States), and many other countries epitomise this phenomenon, where the country in question adopts a process of constitutional transformation that moves it ever further from, rather than towards, democratic principles. Countries from Azerbaijan to Venezuela demonstrate that, when a populist executive gains concentrated power, a reshaped constitution may serve antidemocratic aspirations. What's more, as the Trump administration in the United States shows, even a system with a long pedigree of democratic traditions need not be entirely immune to the outbreak of autocratic political ideas and practices.

In reaction to unsettling constitutional developments allied with the decline of global freedom, a new school of thought has emerged which I call *new transitology*. As opposed to the earlier waves of democratization,[13] the new transitology examines transformations not toward but away from constitutional democracy.

Scholars encounter difficulties when attempting to label the emerging system and its counterparts. The new system ostensibly still belongs to constitutional democracies, but it might be said that it, in fact, is majoritarian rather than consensual; populist instead of elitist; illiberal as against liberal, nationalist as opposed to cosmopolitan; or religious rather than secular. In constitutional theory and political science, there are many metaphoric expressions in use. The typologies can be placed into three groups.

First, some typologies aim to express that in some way the new system merges the characteristics of two opposite systems. The most widespread terms are *hybrid systems* and *mixed systems*.[14] The presupposition of this kind of vocabulary is that two ideal types can be distinguished: democracy and autocracy. This typology has been created in order to identify the unique attributes of the new system and reveal that it combines, arguably, some elements of constitutional democracy (e.g., multiparty elections) with autocracy (e.g., political repression).

The second group of terminological choices tries to keep the new system within the domain of democracy. The phrasing indicates that though the new system still belongs to constitutional democracies, it cannot be regarded as normal or conventional. It is worthy of attention that a large number of qualifiers (adjectives or nouns) try to capture the phenomenon: *defective democracy*,[15]

[12] Freedom House (2016, 2017). See in detail, Tóth (2017a).
[13] Huntington (1991). See also Rustow (1970).
[14] Karl (1995), Bunce and Wolchik (2011), Diamond (2002).
[15] Merkel (2004), Merkel et al. (2003).

illiberal democracy,[16] *populist democracy*,[17] *leader democracy*[18] (or *Führer-democracy).*[19] Similarly, the normative concept of constitutionalism also serves as a basis for identification. Examples include *abusive constitutionalism,*[20] *authoritarian constitutionalism,*[21] *populist constitutionalism.*[22] The concept of *autocratic legalism*[23] also belongs to this category because the adjective "autocratic" significantly changes the meaning of the normative concept of legalism.

Third, some authors choose authoritarianism as a keyword that is opposite in meaning to democracy, constitutionalism, or legalism and put an adjective to it: *semi authoritarianism*,[24] *competitive authoritarianism*,[25] *electoral authoritarianism*,[26] or *stealth authoritarianism.*[27] This solution represents the view that the new political system is distinct from conventional forms of authoritarianism. Rather, it situated on the periphery of authoritarianism because of its more or less democratic features, for example, multi-party competition and popular elections.

Academics analyse and give names to constitutional changes, and these constitutional changes often appear with political manipulation. The danger is that academics are walking into the trap of that manipulation. Consider Russia. Its 1993 Constitution declares that the Russian Federation is a "democratic State" with a "republican form of government". The President, elected by citizens of Russia, "shall be guarantor of the Constitution, of the rights and freedoms of man and citizen."[28] The original text prescribed a four-year term limit and a maximum of two presidential terms successively. The modification of 2008 extended the terms to 6 years. The draft was introduced by President Medvedev, who replaced President Putin earlier that year. In conformity with the rule of law, the change didn't apply retroactively and didn't affect the terms of the incumbent president. However, analysts predicted that the new law, masterminded by Vladislav Surkov, the main ideologist of the Kremlin, could be a sign of Putin's return as Head of the State. The forecast proved to be realistic: The constitutional amendments, together with the interpretation of the constitutional re-election rule, have already ensured Putin eight plus 12 years as President of Russia and a prime ministership in between.

A clear correlation can be shown between the stabilisation of presidential power and the widespread use of two self-definition categories, "*guided*" or "*managed*

[16] Zakaria (1997).
[17] Mudde and Kaltwasser (2017) at 179–94. See also, Mudde and Kaltwasser (2013).
[18] Körösényi (2005).
[19] Lendvai (2017) at 177–188.
[20] Landau (2013).
[21] Tushnet (2015).
[22] Landau (2018).
[23] Corrales (2015), Scheppele (2018).
[24] Ottaway (2003).
[25] Levitsky and Way (2002) at 51. Levitsky and Way (2010).
[26] Schedler (2013). See also, Schedler (ed) (2006).
[27] Varol (2015).
[28] The Constitution of the Russian Federation, Article 1 and Article 80/2.

democracy" (in Russian: управляемая демократия)[29] and "*sovereign democracy*" deriving from Surkov.[30] The former term aims to refer to political stability and successful economic reforms, the latter is meant to stress the fact that in Russia the political decisions are controlled by the Russian nation, thus the will of the majority of citizens matters rather than that of foreign or international organisations.

Remarkably, the words "managed" and "sovereign," combined with "democracy," have positive connotations. They may call attention to favourable constitutional and social signs in a propagandistic way. At the same time, these terms became part of the vocabulary of analysts and commentators. The terms, as one would expect, are used in the scholarly discussion without positive connotations. For example, the changed meaning of "managed democracy" is, among others, that citizens have political rights but they cannot influence affairs of state at all. Democracy is where the authorities arrange elections; managed democracy is where the authorities arrange the elections and the results. On the face of it, the scholarly terminology, borrowed from the regime's ideologist, is neutral as opposed to everyday terms expressing disapproval. (See for example, Имитационная демократия, декоративная демократия, манипулируемая демократия, квазидемократия, псевдодемократия.) However, the problem remains that scholarly vocabulary still echoes the misleading propaganda of the analysed constitutional system.

How can we deal with this conceptual difficulty? It seems clear that the subject matter of the new transitology is a deviation from the accepted standard of constitutional democracy. However, there is no consensus among scholars on terms and vocabulary describing the new constitutional phenomena. It is probably impossible to reach such a consensus on terms. Scholars need to accept that in the field of new transitology alternative typologies are in use. As János Kornai put it, "*No single paradigm, no single system of concepts and no single typology can claim a monopoly on solving every problem.*"[31] But perhaps an examination of the semantic roots of the terminological difficulty may help us better understand the antidemocratic deviation itself.

4 The Causes of the Difficulty

In what follows I identify some main components of the difficulty caused by the new constitutional phenomenon. The first reason for the diverse vocabulary is the understanding that transitory systems between democracy and autocracy belong to an immense grey zone of ambiguities. Even if there is a consensus among scholars about the ideal types or clear standard cases of democracy and autocracy, besides those undisputed cases there exist challengeable *borderline cases* where the democratic or undemocratic character of the regime is a matter of prolonged controversy.

[29] Tsygankov (2014) at 130–140.
[30] Van Herpen (2014) at 57. See also, Kurylo (2016) at 4.
[31] Kornai (2017) at 290.

The explanation for such a classification difficulty can be found in Herbert Hart's seminal work, *The Concept of Law.* He clarifies why professionals may feel hesitation about these kinds of questionable or challengeable cases. Examining the complex terms of "law" and "legal system," he calls to mind that a distinction between standard and borderline cases must be made with regard to "almost every general term which we use in classifying features of human life and of the world."[32] He identifies two types of complication.

A typical difficulty is, Hart explains, that frequently the distinction is not polar but one of *degree*. By way of Hart's example, a man with a shining smooth scalp is obviously bald; another with a luxuriant mop evidently is not; but the question if a third man, with a fringe of hair here and there, belongs to the group of bald persons might be endlessly debated. The concept of baldness, then, is not easily quantifiable; rather, it is a matter of degree. Something similar can be said about the concepts of legitimacy, democracy, and other constitutional principles as well as their opposites such as autocracy. No system in general or state in particular is fully just, legitimate, democratic, but several systems and states may satisfy reasonably well most of the required democratic conditions. There are clearly mature or advanced democracies and clearly undemocratic regimes, but we may also encounter borderline cases, for example, emerging or developing, backsliding or defective democracies. Systems' deviation from the standard case is qualitative, making their classification questionable. In sum, a sharply bipolar division of democracy and dictatorship does not seem to work.

Hart also argues that often a deviation from the standard or paradigmatic case arises when apparently the challengeable case is lacking one or more *distinct elements*, which are regarded as necessary parts of the standard case. What elements make a vehicle'? Does "vehicle" include bicycles? Hart asks.[33] Democracy and other abstract legal concepts also have constituent parts. Scholars disagree whether one or another element is essential to its character as democracy or only contingent.

Of course, there are central elements—or, in Hart's terms, a "skeleton account"—of the salient features of categories. Today it seems undisputed that in a democracy the people are the source of power. It is also widely accepted that multi-party systems, regular elections, and universal and equal suffrage belong to the core elements or "skeleton account" of democracy. Beyond this core, however, we find, perhaps unavoidably, ambiguities. For example, the question arises time and time again if protection of minority rights and constitutional review are indispensable parts of the standard case of democracy or only enhance its quality; or oppositely, should democracy be compromised in order to secure those values. In other words, are acceptance of minority rights and constitutional review a compromise between the standard case of democracy and other constitutional principles? Such disputes may force scholars to reflect on the composition of a standard case.

[32] Hart (1994) at 4.
[33] Hart (1994) at 4, 126.

Second, the subject matter has its *dynamic character*. The deviation from the accepted standard of democracy, which may be called "degradation",[34] "retrogression",[35] or "anti-constitutional populist backlsidinig",[36] is largely dependent on *time and place*. It seems obvious that verdicts may differ significantly when studies do not evaluate the same distinct period in the process of change. Comparative works based on inductive methods are particularly vulnerable to inconclusive results. Which countries are taken into consideration? In what period? Because of the dynamic character of the system transformation a sound finding can be invalidated by the relatively rapid changes. It can easily be the case that at the time of the first analysis a country counts as defective democracy but the circumstances change dynamically, therefore by the time of the next analysis the country has turned into an autocracy.

Think, for example, of the rating process of the Freedom House. It creates categories—rule of law, electoral process, political participation, form of government, fundamental rights, civil society—evaluated as separate entities. The results are weighted according to the importance of the different categories; rates are then aggregated; and finally the status of the country—free, partly free, not free—is calculated according to a combined average of the ratings.[37] Although the rating process is undoubtedly an informative analysis, in itself it can neither explain when and why democracy ends and where autocracy begins, nor reveal the dynamics of the transformation.

This consideration may lead to the third explanation for the diversity of terms identifying the new constitutional phenomenon. The scholars' work is not only a conceptual or descriptive project to understand what democracy, tyranny, and transition from one to another are but also an *evaluative* project. Here I don't mean that labelling their own regimes political leaders use subjective expressions. Of course, autocrats do not aim to describe neutrally the nature of their regime but, being economical with the truth, evaluate positively their own achievement by selecting their vocabulary. What I mean is that the academics' work is not neutral among the political disagreements. Academics who characterise one country as democracy and another as autocracy or dictatorship evaluate unavoidably constitutional practices.

Let us return for a moment to the disagreement about whether democracy means majority rule. Some argue that the system in which the majority takes all is by definition democratic, while others insist that it is not only unfair but also undemocratic. How can scholars identify their definition of democracy or autocracy? Many types of conceptual and empirical studies have dealt with manifestations of non-democratic rule. Several have adopted a comparative approach and a range of collected sets of information have become available to constitutional and political scholars. There is no consensus, however, on the conceptual criteria for distinguishing democratic constitutional systems from others. Whatever crucial the empirical studies are,

[34] Diamond (2015).
[35] Ginsburg and Huq (2018).
[36] Sadurski (2018a) at Sect. 3.
[37] Freedom House (2016, 2017).

they are not fully satisfactory. We find neither convincing scholarly consensus nor conclusive statistical, historical or comparative data. Again, the meaning of democracy is "essentially contested".[38] Although no one rejects the idea that democracy, as a constitutional principle, is of great significance, there is constant disagreement about which meaning of the principle of democracy best accounts for that significance. Beyond its very core, the concept of democracy is not governed by standard criteria determining correct or deviant forms of constitutional systems.

Past and present practices are also diverse, therefore empirical generalisation does not help too much. The understanding of contemporary democracy, let's say in Scandinavian countries, is obviously different from the Ancient Greek city-states or eighteenth-century America. And even if, as a result of comparative research, scholars collect informative data about the standard or typical characteristics of contemporary constitutional democracies, they will still find a justified distinction between essential and inessential features. Consequently, the project is not only descriptive but unavoidably normative. As Dworkin points out, "Descriptive meaning cannot be peeled off from evaluative force because the former depends on the latter in that way."[39] Therefore systematic analyses combining empirical descriptive and comparative methods with a normative, interpretive approach to constitutionalism may offer more convincing results. The threshold depends not only on ranking but also on justification that a given constitutional system still counts as democracy or not.

5 New Authoritarianism: Pretence of Democracy

In comparison with its despotic or tyrannical predecessors, modern autocracy is a multifaceted phenomenon. Autocratic constitutional systems vary in terms of both of their political background and legal features. The roots of terminological difficulties also reveal that it is not advisable to apply a dual methodology. It might be reasonable to assume that the new phenomenon in the borderline area between the two opposite poles, democracy and autocracy, constitutes a *sui generis* system. If this is true, the vocabulary of Juan José Linz, the eminent political scientist may be helpful. He suggests that an account of contemporary institutional systems differentiates democracy from autocracy; and within the latter a difference can be drawn between authoritarian and totalitarian systems.[40]

In contrast to majoritarianism, I take a complex definition of democracy. As a normative concept, it can be labelled as both liberal democracy and constitutional democracy, two perspectives from which the same entity can be approached.[41] In this context, the term liberal democracy puts the emphasis on a set of values and principles: liberty, equality, autonomy, collective self-governance, equal participatory rights in political decision making.

[38] Gallie (1956).
[39] Dworkin (2004) at 9.
[40] Linz (2000).
[41] Kis (2003) at ix–x.

Concerning institutional preferences, constitutional democracy typically indicates that the constitution, as a legal norm, enjoys the highest rank both procedurally and substantially; free and fair elections are held periodically; elected representatives of the people make laws; governmental powers are constrained; and judicial institutions enforce fundamental rights.

I understand autocracy, as a broad normative term, as arbitrary governmental authority, or typically, arbitrary powers of a single ruler, who is not constrained either by legal norms, institutional checks, or the will of citizens at the ballot box. The common feature of autocratic states is the enforcement of obedience to a central authority at the expense of personal freedoms, rule of law and other constitutional values and principles. In other words, autocracy can be characterised by chronic shortcomings: narrowed political pluralism, absent or inadequate democratic institutions, denied or unenforceable fundamental rights, lack or shortfall of constitutional checks and balances, and oppression of non-governmental organisations.[42]

Contrasting with the principles of democracy, autocracy prefers either rival values such as official ideology (e.g., communism in constitutions of Soviet-type system) or conventional norms of a certain religion (e.g. in the Constitution in Egypt, "the principles of Islamic Sharia are the principal source of legislation"), or pragmatic decision making (e.g., bureaucracy in military systems).

Concerning institutional preferences, in contemporary autocratic systems, the *de jure* or de facto executive is favoured typically with unconstrained and indefinite competences, either by the constitutional text or in an unwritten way.

The twentieth century gave birth to totalitarianism, a new type of autocracy, both in Nazi Germany and in the Stalinist Soviet Union. Identifying a totalitarian system might seem straightforward: a ruler with absolute power, coercion imposed through violence, strong mobilising ideology, the people fully subservient to the state, a single-party regime, and militarism[43]; whereas authoritarianism, a weaker but *sui generis* form of autocracy can be much more difficult to distinguish from weaker forms or practices of democracy. Why? In the previous section I recalled some general semantic reasons so as to better understand the difficulties the new transitology's vocabulary. Here I offer a further answer specific to the new constitutional phenomenon.

I call the key attribute of the new authoritarian system that causes identification difficulties the *pretence of democracy*. Given that today democracy counts solely as a legitimate constitutional system, the most salient new feature is that authoritarianism must play at being democracy.

Pretence means, first, that legal change from democracy into autocracy is peaceful and coordinated. As opposed to traditional autocrats who murdered or violently suppressed opponents, imprisoned journalists, suspended legislation, and abolished courts, contemporary populist autocrats gain power peacefully and legitimize themselves through multi-party elections and referenda.

[42] This approach is slightly different from my Authoritarianism, see Tóth (2017b).

[43] Arendt (2004).

Remember the archetypal case of Weimar Republic proving that democracy may be turned into even dictatorship by unfavourable circumstances. Examining extra-legal causes, many similarities between the old and new types of autocratic change can be detected. Economic decline (the Great Depression of the 1930s, the global financial crisis of 2008), internal threats from political extremists, and failed cooperation of moderate political parties typically play a part in the fall of constitutional democracy. Perhaps one of the common decisive factors is that political institutions are unable to deal with economic, social, and constitutional crises. The crucial difference between traditional and new model of regime change is that Hitler did not gain power peacefully and democratically. As a result of the last free and fair elections (November 1932) he could not form a government because the Nazi Party had fewer seats in the Reichstag than before. The last multi-party elections before the war (March 1933) were very far from fair and democratic because Nazi paramilitary organizations displayed violence and extreme fear, orchestrated by the recently appointed Chancellor, Hitler, across the country. Despite repression, the Nazis again failed to gain an absolute majority, and what followed within a couple of months was a pure dictatorship. In the new model, on the contrary, the whole constitutional transformation is typically a long process, and the first decisive moment is a free, fair and democratic election. Arguably, what the people want, the people have.

Second, the new type of system behaves *as if* it were a constitutional democracy.[44] Although contemporary authoritarians have not given up the complete mechanism of their ancestors, authoritarianism has been undergoing a modification. In other words, under pseudo-constitutionalism it claims to abide by democratic principles. In the early twenty-first century, many authoritarian incumbents are elected leaders who adopt constitutions and laws that apparently correspond to legal systems in democratic countries. Around eighty percent of autocracies have periodically elected multi-party legislation. This is why antidemocratic tendencies are more difficult to discover and assess properly.

The most extreme counterexample can be Hitler, who, before the seizure of power (*Machtergreifung*), repeatedly denounced the egalitarian principle of democracy as well as the multi-party constitutional system, associating them with "internationalism", "Bolshevism" and "Jewish conspiracy." After his seizure of power, the hostility to democratic constitutionalism was embodied in, among others, the Enabling Act (*Ermächtigungsgesetz*), ban of parties, dissolution of the Reichstag, suspension of political liberties, and turning into totalitarianism, mass-arrests, extrajudicial killings, and genocide.

Old-fashioned dictatorships (single- or dominant-party system, strong political repression, censorship, strong mobilising ideology etc.) such as North Korea, Saudi Arabia, or, to some extent, China are exceptional today. The typical case is that regular elections are held, laws are adopted in a multi-party parliament, controlling constitutional institutions remain in place, blatant prohibitions and censorship are not experienced every day. What is more, the new system proclaims that it can reduce permanent problems of limited governments by applying the democratic principle

[44] Tóth (2017a, b).

of majoritarianism. When the winner really takes all, ostensibly better democracy is produced than its predecessors and rivals.

The pretence of democracy has of course its predecessors. A well-known example is the Soviet-type autocracy, which calls itself "people's democracy," as opposed to the untrue or less advanced "bourgeois democracy". (See e.g., the "German Democratic Republic".) However, that system is characterized by a single-party structure (e.g. Hungary, Romania) or a dominant-party structure (e.g., Czechoslovakia, GDR, Poland) without the possibility of competitive elections. Citizens with voting rights are allowed to vote but only for the candidates of, or a party-list dominated by, the ruling party. This is why "elections without choice" is one of the most compact expressions for the Soviet-type system. Contemporary authoritarianism, however, distinguishes itself successfully from the Soviet-type system and other obsolete machineries of tyranny.

It is crucial to this understanding that the complex definition of democracy may help us identify authoritarianism as a pretence of democracy. A broader and narrower argument can come into play. The broader case, presented famously by Dworkin, rejects the idea that democracy just means majority rule. He argues that a pure majoritarian decision making neither has an intrinsic value, nor serves the principle of fairness, nor offers better consequences for society. Moreover, Dworkin rejects the claim that majoritarianism is the best realisation of political equality.[45] Carl Schmitt also questioned remarkably that the will of the people is identified with the will of the majority. But contrary to egalitarian claims, he believed that a decent dictator can be a legitimate representative of the people's will.[46] The only common point in a Dworkinian and a Schmittian rejection of majoritarianism is that democracy is not a mathematical matter, but a matter of status. Democracy as an egalitarian concept means that each person's life and dignity matters equally, and each person's voice and vote are equally counted. In short, the strong version of the argument insists that democracy, understood as the people's rule, has little to do with majority rule. If this conclusion is not mistaken, the new authoritarianism's appeal to majoritarianism fails, because the idea that people get what the majority wants, while the rest of society does not really matter, is not justified.

But let's assume for a moment that majoritarianism is based on good reasons. A narrower argument indicates that even if we take a majoritarian conception of democracy, authoritarianism fails to fulfil its criteria. Perhaps everyone agrees that fair and free popular elections are a prerequisite for majoritarianism. Therefore, first, majority rule includes some procedural rights. It seems also widely accepted that there are no fair and free elections without impartial election bodies and independent judicial review of the procedural decision of those bodies. Therefore, second, majority rule also includes institutional guarantees. Moreover, there are no free elections without permanent and passionate public discourse and political activity. Thus, third, a set of rights, from freedom of speech and the media to freedom of personal liberty, are also necessary conditions of majoritarianism. In other words:

[45] Dworkin (1996) at 15–35. See also, Dworkin (2012) at 25–34.

[46] Schmitt (2014) at 112–131. Schmitt (1985) at 28–32.

even within the majoritarian paradigm there are constitutional mechanisms serving to govern the formation of a normatively legitimate majority rule. In short, the new type of authoritarianism is a pretence of democratic majoritarianism. If this argument is correct, the concept of pretence of democracy also suggests that on descriptive level there is no significant difference between constitutional democracies and the new type of authoritarianism. What matters is their normative difference from one another.

To sum up, though authoritarianism can be seen as a transitory system emerging typically from the deep crisis of democracy and having a tendency toward dictatorship, I consider it as a political-constitutional system of its own kind, between constitutional democracy and strong forms of autocracy. One the one hand, notwithstanding that authoritarians have not entirely abandoned the aims and methods of their ancestors, authoritarianism has been undergoing a reinvention in recent years. Therefore it is not simply a repetition of history.[47] On the other, since authoritarianism pretends to be constitutional democracy, it is misleading to characterise it with the normative terms of democracy, constitutionalism, rule of law, competitive elections and so on.

6 First-Order Markers of Authoritarianism

The next step toward the conclusion that the key attribute of the new authoritarianism is the pretence of democracy requires an account of the essential elements of this pretence. The claim is that the pretence of democracy that is the new authoritarianism can be identified by revealing constitutional markers that allow a reliable distinction between democratic and authoritarian norms and practices. Importantly, constitutional markers can characterise an authoritarian system only when they form a system by constituting a constant pattern, rather than appearing only sporadically. In this article I differentiate between first-order and second-order markers.

First-order constitutional markers are those at the primary or most fundamental level of analysis. They can be detected in either constitutional norms or practices of an authoritarian system. In what follows I offer a list of the most salient first-order markers of authoritarianism.

6.1 Pseudo-Constitution

As part of the pretence, the constitutional texts in authoritarian systems are often not fundamentally different from those to be found in constitutional democracies. The difficulty, however, is that authoritarian constitutions do not follow a regular pattern. In some countries, constitution making starts early. Good examples of this might be the rapid adoptions of the constitutions of Venezuela and Ecuador, or the Hungarian Fundamental Law. The case of Turkey is an example of an alternative method: the

[47] But see, Albright (2018). See also, Diamond et al. eds. (2016), Levitsky and Ziblatt (2018).

Constitution has been amended several times so as to change the system gradually and completely. In other cases, political practice rather than constitutional modification as such makes the difference. For instance, the 1993 Russian Constitution is not fundamentally different from the 1958 French Constitution whose presidential form of government it has adopted; yet it functions entirely differently. In exceptional cases, nothing has changed on the constitutional level. In Poland, an authoritarian system in the making, the ruling party lacks a qualified majority; therefore it cannot abolish the Constitution and adopt a new one in a way that conforms to the law. It can be said, however, that the Constitution of Poland is a dead letter or de facto invalid because it is disregarded systematically by ordinary laws.[48]

Perhaps the only common feature of the authoritarian constitutions is that they do not serve as normative benchmarks. Loewenstein calls a normative constitution that is real, living, effective, and enforced, and "actually governs the dynamics of the power process instead of being governed by it."[49] In this sense, a normative constitution is the ultimate legal control on political processes. This concept is equivalent to Sartori's "*garantiste* constitution," which puts an obstacle in the way of arbitrary governmental power and ensures limited government.[50] Today, Dieter Grimm calls it an "achievement of constitutionalism" when constitutions rule out any absolute or arbitrary power of man over man.[51]

In contrast to the normative constitution, today an authoritarian constitution is a combination of a descriptive "map of political powers"[52] and a "façade" constitution.[53] I call this a pseudo-constitution.

As a predecessor of contemporary pseudo-constitutions, we may consider Loewenstein's semantic constitution. It is a mere description of the governmental system; in the author's words, "[it] is nothing but the formalisation of the existing location of political power for the exclusive benefit of the actual power holders … Instead of serving for the limitation of political power, it has become the tool for the stabilisation and perpetuation of the grip of the factual power holders on the community."[54] The semantic constitution is thus not an "honest" instrument but a means by which an autocratic government disguises its true character. Lowenstein saw the Constitution of the Soviet Union as a clear case of the semantic constitution.

Sartori identifies another type of fake constitution, which he calls "façade constitution." It appears to be a true constitution compatible with the values and principles of normative constitutionalism from checks and balances to multi-party elections, but these "are disregarded at least in their essential garantiste features." As far as the liberty and equality rights are concerned, they are dead letters.[55]

[48] Sadurski (2018b).
[49] Loewenstein (1957) at 148–149.
[50] Sartori (1962) at 861.
[51] Grimm (2002) at 31. Grimm (2012) at 104. See also Ginsburg and Simpser (2014).
[52] Barendt (1998) at 6.
[53] Sartori (1962) at 861.
[54] Loewenstein (1957) at 149–150.
[55] Sartori (1962) at 861.

In the pseudo-constitutions of contemporary authoritarianism, there is a significant overlap between components of semantic and façade constitutions. They are partly descriptive and partly sham. Consider the Fundamental Law of Hungary. On the one hand, it describes the existing representative, executive and judicial institutions, and gives information about the state's non-secular commitment and anti-asylum-seeker attitude. On the other, it basically presents a façade by proclaiming that the state is democratic under the rule of law, that the government respects human rights, and that no one's activities shall be aimed at the exclusive possession of power.[56]

Authoritarians adopt pseudo-constitutions because today the constitution is globally approved as a pattern of legitimation. However, the text of a pseudo-constitution is typically inconclusive because some parts are effective in a descriptive sense only, while others are systematically disregarded. In other words, such constitutions lack normative relevance because all political power resides with the leader of the ruling party. For this reason, in order to understand how an authoritarian system is really governed, the actual practice must be examined, in addition to the constitutional text.

6.2 Hegemonic Voting Practices

Authoritarian systems constitutionally retain multiparty elections and provide scope for the activities of opposition movements. What makes them distinctive is that the election is managed so as to deny opposition candidates a fair chance. Legal norms and practices ensure the dominance of the ruling party. The governing party may enjoy undue advantage because of partisan changes in election law, unequal suffrage, gerrymandering of electoral districts, restrictive campaign regulations, far from independent assessment of the election, and biased media coverage that blurs the separation between political party and the state (e.g. Hungary). Modification of voter identification and registration laws may result in de facto disenfranchisement (e.g. Zimbabwe under President Mugabe). Electoral laws may unfairly promote voting by the diaspora (e.g. Senegal), or hinder the voting ability of émigrés (e.g. Venezuela under Chavez). Even landslide victories for authoritarian leaders, or their parties, may be attributed to a range of tools at the disposal of incumbents, such as manipulation of the public by mass media (e.g. Hungary, Russia, Turkey), or strategic delays to scheduled elections (e.g. Lebanon).

6.3 Imitation of Institutional Checks

Contemporary authoritarianism maintains the entire set of formal institutions associated with constitutional democracy, yet these serve both as a façade of representation and as a tool of authoritarian imposition.[57] Although the constitutional structures of authoritarian states inevitably consist of the three main parts—the legislative, the

[56] See in detail Tóth (2012).

[57] Schedler (2013) at 54–61.

executive, and the judicial branches of government—they are not based upon the principles of checks and balances.

Institutions of constitutional judiciary are not abolished, as autocrats in the old times would have done, but neutralised in a seemingly democratic way. (The only exception is Kyrgyzstan, where the Constitutional Court was abolished with the adoption of the Constitution of 2010, when some of its powers were transferred to the Supreme Court.) In practice, constitutional and/or statutory regulations, as well as constitutional conventions, are "reformed" by the legislative majority. The results are politically expedient modifications to anything from the personal composition ("court packing"), to the competences, to the institutional and financial independence of the constitutional court in question. For example, this is precisely how the Hungarian and Polish Constitutional Courts were rendered ineffective. In this way, decisions of the constitutional justices, appointed according to the will of the authoritarian leader, may contribute to the reinforcement of the system. As the record of the Valery Zorkin-chaired Russian Constitutional Court demonstrates, altered but not abolished tribunals may serve as a tool of authoritarian imposition. Vladimir Putin thus deployed constitutional review to help centralise and consolidate his authoritarian power. Moreover, authoritarians occasionally tolerate painful judgments to construct a façade of constitutionalism, provided that the judiciary does not threaten the core of authoritarian institutional design (as was the case with the judiciary in Egypt under President Mubarak). Invariably, the aim behind such constitutional changes is to safeguard and promote the interests of a particular political force without constitutional balances.[58]

6.4 Superior Executive

In an authoritarian system, the constitution proclaims institutional checks and balances but the constitutional powers are utterly unbalanced. The executive branch—especially the head of the executive: the president (e.g. Turkey and Russia), the prime minister (e.g. Hungary), or the de facto head of government (e.g. Poland under Kaczynski)—is not only superior in power but, in the legal sense, enjoys unchecked power. Formal and actual power may differ significantly, as in Russia under the presidency of Medvedev, or formal governmental dominance may be subordinate to informal party dominance, as in Poland.

The constitutional struggle against authoritarianism, particularly in Africa and Latin America in recent decades, has often focused on the introduction of presidential term limits, while autocrats frequently strive to have these term limits removed, by constitutional reform and/or by reinterpretation of the term limit by the constitutional court (e.g. Peru). This scheme has been used in Burundi and Rwanda, where controversial third terms entrenched the position of the incumbent presidents.

Clearly, constitutional democracy may take various institutional forms: it may be a monarchy or a republic; it may have a presidential or a parliamentary system; it

[58] Varol (2015) at 1689.

may be a federal or a unitary state. Nonetheless, comparative surveys of governmental systems reveal that some presidential systems have difficulty sustaining democratic practices. Under a range of cultural and social conditions, parliamentary systems are more democratically robust than presidential ones.[59] Depending on political traditions, culture, and the electoral system, the transformation of the executive and the legislative branches into a presidential system may lead to authoritarianism, yet this is not necessarily the case. To illustrate: although both the 1958 French and the 1993 Russian Constitutions were seen as reactions to parliamentary paralysis, with aspirations for a strong executive, French political and constitutional practice managed to maintain constitutional democracy in the long term; in contrast, since the relatively tolerant beginnings of Yeltsin-era Russia, under Putin the country has moved dramatically toward the authoritarian practices of the post-Glasnost era, although there have been minimal changes to the constitutional text itself.

6.5 Restricted Fundamental Rights

Authoritarian constitutions formally declare fundamental rights for their citizens, but these are rarely legally enforceable. A common tactic is to construct a constitutional catalogue of fundamental rights, ostensibly based upon the international standards arising from the UN's Universal Declaration of Human Rights and regional human rights treaties. Yet the constitution in reality contains a number of sections in direct contradiction to international human rights law, typically, recognising certain fundamental rights, but only to the extent that these rights serve the interests of the ruling political group. For example, freedom of speech and the press can be denied or restricted in the name of the nation, the dominant ethnic group or religion, or protection of the head of state or other public officials.

Although criminal prosecution is still a tool for authoritarianism (see Turkey), political leaders often opt for a less blunt approach, choosing to sue journalists and civil rights activists for defamation to silence dissent, rather than resorting to imprisonment, or blatant prohibitions or suppressions of journals, books, films, or websites. Authoritarian leaders tend to restrict freedom of speech by de facto capturing an immense part of mass media, and *de iure* takeover of public media. As part of the pretence, media propaganda and manipulation are officially called disclosure of public information.

Racial or ethnic exclusions, as well as repression of civil society are among the traditional characteristics of autocratic constitutional systems. Although today civil society organisations are rarely prohibited, many regimes, from Algeria to Venezuela, have adopted discriminatory, inflexible, and costly requirements for the registration and reporting of civil society groups. Likewise, "foreign agent" laws have been used as a tool of authoritarianism; their primary aim is to curb cooperation between international and domestic NGOs (e.g. Belarus, Hungary, Israel, and Russia). Moreover, as part of the game of pretence, in many regimes

[59] Linz (1978), Lipset and Lakin (2004) at 38–48.

government-organised non-governmental organisations (GONGOs) have been set up and/or financed by the government in order to imitate civil society, promote authoritarian interests, and hamper the work of legitimate NGOs (e.g. Egypt, Hungary, Russia, Syria, and Turkey). Thus, it may be true that authoritarian governments are careful to avoid anything that could look like serious violations of fundamental rights[60]; yet behind the veil of constitutionalism, a systematic abuse of fundamental rights can be found.

7 Second-Order Markers of Authoritarianism

Second-order markers can be considered as the pretence of normative justification for authoritarianism. They are normative tools or devices manipulated by authoritarians to create constitutional norms and practices that pretend democracy while aiming at authoritarianism. To call first-order markers the visible signs of authoritarianism, mirroring in the constitutional text or judicial practice, and second-order markers the hidden means for deception, would be perhaps an overstatement. The premise is rather that constitutional scholars can reveal the deep structure of counterfeit democracies by exposing their normative core as second-order markers.

What is the general pattern of second-order markers? I have been arguing that the abstract principle of democracy is open to competing interpretations. Some believe that democracy means first and foremost government by the majority of the people; others, myself included, disagree and argue for a more complex account of democracy. Long-standing substantive disagreement about basic constitutional categories is a well-known phenomenon in constitutional theory. Here the famous distinction between concepts and conceptions, originated in the works of William Gallie and Herbert Hart, and used prominently by Rawls and Dworkin, can be helpful again.

The *concepts* of "democracy," "equality", "fair elections," "human dignity," and similar constitutional terms are abstract general ideas. Constitutional concepts are unavoidably contested because different theorists and lawyers have different *conceptions* about the proper understanding of those concepts. While in his *Theory of Justice*, Rawls defends justice as fairness as the best conception of justice, others offer different conceptions. For Dworkin, the best conception of equality includes, under certain circumstances, affirmative actions; others disagree and offer a more restrictive reading of equality. The relation between concepts and conceptions is interpretive. That is, the constitutional law is full of contested concepts, and it is a matter of interpretation to determine which conceptions are the most defensible.

We can simplify the concept/conception distinction by reducing it as much as possible: In a constitutional democracy, a concept can be connected with rival democratic conceptions A and B. In an authoritarian system, whose key attribute is the pretence of democracy, the formula works as follows: authoritarianism pretends that conception B and not A has been selected so as to justify the democratic character of the system. This is, in fact, a false justification, because an antidemocratic

[60] Müller (2018).

conception C is in use. I call this kind of shift from democratic conception B to anti-democratic C second-order markers of authoritarianism. The constitutional mechanisms by which authoritarianism misleadingly displays itself as a democracy are of course more complex than that. But this simplified scheme of second-order markers may make easier to understand the emergence of contemporary authoritarianism. Below I demonstrate the phenomenon by way of paradigmatic examples.

7.1 Hegemonic Voting Practices

Today there is broad agreement that legitimacy means constitutional democracy, and constitutional democracy requires regular elections that are both free and fair. Moreover, almost nobody disputes that elections must be held by secret ballot on the basis of a universal, equal, and direct right to vote. Beyond that, there is disagreement about which electoral system best fits those democratic principles. Although constitutional law does not offer a uniform classification of electoral systems, and a virtually incalculable number of voting methods exist, for my purpose the two well-known main types are needed only: Majoritarian (including first-past-the-post voting), and proportional representation, both of which have their advantages and drawbacks. Let us call the former system conception A, and the latter conception B.

As explained earlier, one of the authoritarians' main aims is to legitimize themselves through multi-party elections. The system apparently implements a first-past-the-post voting method or a hybrid system where majoritarian elements are dominant, but that is nowhere near to conception B, because legal norms and practices—that is, the system as a whole—guarantee the dominance of the ruling party. Contrary to conception B of constitutional democracies, conception C fails to take into account politico-cultural traditions, demographic dissimilarities, and distinctive legal practices, not to mention the systematic gerrymandering and other fraudulent features appearing within this conception. This is why we can distinguish democratic conceptions A (majoritarian) and B (proportional) from an authoritarian conception C (hegemonic).

Here I do not have space to give an explanation, but the reader can easily do so, for the similar features of direct democracy, distinguishing democratic conceptions of referendum from the highly manipulative "national consultations" (again, a conception C), employed from Venezuela to Hungary. Thus, rejecting political pluralism and deliberative procedures do not belong among the defensible conceptions of democracy. The authoritarian system appears to be a majoritarian one backed by the electorate, but authoritarian leaders claim exclusive moral representation of the people.

7.2 Imitation of Institutional Checks

Constitutional scholarship has devoted considerable attention to characterising reciprocal actions between legislature and judiciary. Authors disagree over judicial authority to review the constitutionality of legislative acts, and whether judges have final interpretive authority in matters of fundamental rights and constitutional

principles. These problems have their roots in the Kelsen-Schmitt debate on the guardians of the constitution.[61] Contemporary discussions are also explainable in the light of the Ely-Dworkin and Dworkin-Waldron debates on the legitimacy of judicial review.[62] Recently, much new scholarship has emerged, offering, on the one hand, intense critiques such as Mark Tushnet and Ran Hirschl, and on the other, justificatory perspectives such as Mattias Kumm.[63] It seems easy to fit these controversies into the scheme of conception A versus conception B. Theorists of conception B suggest that parliament as an elected, representative body and, tentatively, some direct participatory forms of democracy provide a superior kind of democratic deliberation than decision-making by unelected judges.

Authoritarian leaders are hijacking the conception B by also invoking the "We of the people" to limit the role of the constitutional judiciary. Apologists for the pretence of democracy imitate systematically the conception B when the new system reportedly replaces "juristocracy" with "parliamentary sovereignty," and ostensibly introduces "political constitutionalism" instead of "legal constitutionalism." But in reality, this is conception C. Weaker constitutional ties in this conception mean that it is not only the judiciary but also other democratic institutions and public deliberation that are undermined. It becomes possible to sidestep principles of democratic representation and participation if the popular will is not legally constructed or channelled, but is rather the echo chamber of a dominant leader. Consequently, authoritarian leadership emerges at the expense of not only constitutional judiciary but also of parliamentarianism.

7.3 Superior Executive

An important stepping-stone to authoritarianism seems to be the broad and/or ill-defined powers of the executive. Let us take emergency powers. When the survival of the constitutional democracy is at stake, extraordinary circumstances may justify temporary suspensions of constitutional guarantees. A dualism of conceptions can be sketched from many aspects of the emergency law. Theories are divided between a Lockean tradition, which allows discretionary power in a case of emergency for the public good, even against the law and a Kantian tradition, which insists that the rule of law should control politics even in times of emergency. Constitutional models of the US and Germany can be distinguished, because the former hardly regulates emergency situations except for the suspension of the Habeas Corpus, while the latter provides a detailed regulation for the federal government. There are also rival models for institutional design, on the one hand entitling the legislature to address the norms of the state of emergency, on the other empowering the executive to determine whether there is an emergency and how to cope with it.[64] What is common in

[61] Kelsen (1976) and Schmitt (1996).

[62] Ely (1980) and Dworkin (1977). Dworkin (1998) and Waldron (1999) and a partly revised view, Waldron (2006). See also the last word from Dworkin (2012) 483–485.

[63] Tushnet (1999) and Hirschl (2007) and Kumm (2007).

[64] Dyzenhaus (2012) at 442–461. See also, Dyzenhaus (2006).

many variants of conceptions A and B is that constitutional rights are suspended only temporarily, judicial review of the executive is accepted, and the main purpose of the state of emergency is to restore the democratic legal order and the full enjoyment of human rights.

An authoritarian conception C of emergency, by contrast, refers to Locke but follows Carl Schmitt, who adopted the radical position that "the Sovereign is who decides on the state of exception."[65] Conception C may seemingly borrow a German model, but the restrictions are far from temporary and the judicial control is illusory or non-existent. As the constitutional developments in Turkey show, by referring to terrorist threats and other imminent dangers, the head of the executive, the "guardian of the Constitution," can successfully initiate a wide-reaching constitutional amendment, leading to an authoritarian system. In sum, in a regime that seeks to distance itself from constitutional democracy, the ruler's declaration of a state of emergency serves to institutionalise an arbitrary executive power unhampered by legal constraints, thus creating a long-standing special power beyond the rule of law.

7.4 Restricted Fundamental Rights

I take the case of freedom of speech versus human dignity as a paradigmatic example. From a comparative perspective, there are two different models of hate speech laws—that is to say, two competing interpretations of the concept of human dignity. In the USA, freedom of speech enjoys a privileged status, whereby dignity claims of vulnerable groups cannot justify speech restrictions. What matters, if anything, is the dignity and autonomy of the speaker (conception A).[66] Other advanced democracies on different continents, in contrast, allow hate speech prohibitions for the sake of competing constitutional values, foremost, the dignity of members of vulnerable groups (conception B). A controversial justification for this conception is provided by Jeremy Waldron, who focuses on the vulnerable minorities facing threats, humiliation, and discrimination, and invents a new argument supporting hate speech restrictions: An attack on dignity of vulnerable groups undermines their inclusion in society, this is why, Waldron argues, it should be legally restricted.[67]

On the face of it, conception C invented in authoritarian systems echoes a Waldronian reading of dignity by emphasising that not only individuals but also a number of people classed together have a right to dignity. What makes conception C distinctive is that the laws protect the members of the majority, citing, for example, the dignity of a nation, a country, or a dominant ethnic or religious group; yet at the same time these laws disrespect vulnerable social groups. It seems clear that where restrictions on free speech favour those in majority and power, while members of vulnerable social groups are targets of government-orchestrated hate speech, such regulation may constitute one aspect of an authoritarian approach. In short, while conception B is a matter of controversy because of the uncertain balance between

[65] Schmitt (2005) at 5. See also, Schmitt (1996).
[66] Baker (2011).
[67] Waldron (2012).

free speech and other democratic values, conception C clearly subordinates free speech to antidemocratic ideas.

I think much scholarly research is still needed to understand better the constitutional mechanism of contemporary authoritarianism. In this article, I have argued that it is neither a simple repetition of history nor a variation of constitutional democracy. I have suggested a different approach, one based on the view that authoritarians are under the pressure to pretend to be democrats. We must therefore unmask them by identifying those constitutional markers that serve as the tools of pretence.

Acknowledgements Versions of this paper were presented at the workshops "Beyond the Liberal Constitution", Wolfson College, University of Oxford; "Constitutionalism, Dissent, and Resistance", Humboldt University and Princeton University, Berlin; "Resurgence of Executive Primary in the Age of Populism", Academia Sinica, Taipei; and at the GlobCon Colloquium of the WZB Berlin Social Science Center. I wish to thank Teodor Papuc for his research, and János Kis, Kriszta Kovács and Mattias Kumm for their helpful comments.

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